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Supreme Court of the United States

OCTOBER TERM, 1940

THE CITIZENS NATIONAL BANK
OF WACO, TEXAS,
Petitioner,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondent.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

THE CITIZENS NATIONAL BANK OF WACO, TEXAS,

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March, 1941.

HAUSER PRINTING CO., INC., NEW ORLEANS

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No. _____

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OF WACO, TEXAS,

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vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Petitioner, The Citizens National Bank of Waco, Texas, seeks a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review its judgment (R. 162) rendered January 13, 1941 (rehearing refused March 8, 1941) affirming the judgment of the District Court of the United States for the ~~Eastern~~ Western District of ~~Louisiana~~ Texas, rendered May 2, 1940 (R. 45).

This application is made prior to April 7, 1941.

II.

Jurisdiction of this Court is asserted under U.S.C.A., Title 28, Sections 347 and 377, and Rule 38 of this Court,

particularly the clause permitting certiorari where a Circuit Court of Appeals has "decided an important question of local law in a way probably in conflict with applicable local decisions," and because the questions are of **wide public interest** since every one of the numerous depository banks in Texas is directly affected.

III.

Summary and Brief Statement

1. Gibson Gayle, a Texas tax collector, defaulted. The District Court held (R. p. 40, §14) and no one, we believe, denies that:

> **"The shortage of Gibson Gayle was a result of his embezzlement and defalcation, and the defendant bank did not participate in same or have any knowledge or notice of such shortage, nor did it receive any benefits from said defalcation of Gayle; that all of the checks paid by defendant bank on said Collection Account or any tax collection account maintained by Gayle with it were signed by Gibson Gayle, as tax collector, or by his authorized deputy."**

Fidelity & Deposit Company of Maryland was surety on Gayle's official bond. It admitted the defalcation and paid the loss, amounting to $52,268.98, to the State. Thereupon, claiming to be the subrogee of the State's rights, it sued for that amount petitioner, The Citizens National Bank of Waco, Texas, which had been used as the depository by Gibson Gayle, Tax Collector, claiming that under the Texas Statute (Art. 7250 R.C.S.) such depository may honor checks on official deposits **only to treasurers or to the tax collector for approved commissions,** and that since defendant bank honored checks which, though properly and officially signed, were drawn

to persons other than treasurers or to the tax collector for approved commissions, it must show that such checks enured to the benefit of the State or County.

2. Defendant Bank, acting as it believed pursuant to a suggestion by the Comptroller (R. 72) and Attorney General (R. 72 and 73) of the State of Texas, approved by an appellate court of the State of Texas (R. 73 and 74, *State vs. Harvey*, 15 S. W. (2) 82), had made an agreement with Gayle that he might deposit all of his collections and monies in a non-interest bearing **collection account,** and thereafter allocate those funds to their proper accounts and this course had been followed. The Bank defended on the grounds:

(1) That it did not "participate in the shortage or have any knowledge or notice of same, or receive any benefits therefrom, and that all checks honored by it were properly and officially drawn. That the State and bonding company were at fault in not requiring Gayle to make weekly remittances as required by the Texas Statutes.

(2) That the Statutes of Texas, **as construed by the courts of Texas,** not only **did not** limit checks by tax collectors to checks **drawn to treasurers** or to tax collectors **for approved commissions,** but actually **required** that such checks be drawn to various persons and authorized that such checks be drawn to bearer or to the tax collector, and that all checks of Gibson Gayle honored by it were officially signed and were drawn as contemplated by the Texas Statutes, and that it had the right to assume that Gayle, a twice-elected public officer, was honestly discharging his duties."

(3) That plaintiff Bonding Company was surety, not only on the bond of Gibson Gayle here in question,

but also on another bond securing Gibson Gayle's State Highway Account; that there was a shortage in the said Highway Account, for which plaintiff Bonding Company was liable; that $14,562.56 was drawn by Gayle from his Tax Collector's Account in defendant Bank and placed in his Highway Account (R. 117 to 151) thereby **relieving** the shortage in that account and relieving of liability for the shortage in that account of **plaintiff Bonding Company,** which was surety for that account, and that it is illegal and unrighteous to compel defendant Bank to pay the benefiting Bonding Company the $14,562.56 which Gayle thus used for its direct benefit. (C.C.A. opinion R. 165) *ibid.* 168.

(4) That under Article 6003, Revised Civil Statutes of Texas, and the authoritative decisions of the Courts of Texas in *Bordelon vs. Philbrick, et als.*, 84 S. W. (2) 710, and *Tabor vs. McKenzie*, 49 S. W. (2) 874, the defendant Bank, in case it was occasioned a loss by the Tax Collector, had the right to recover from the Bonding Company on his official bond and that, under these circumstances, that Bonding Company can not recover from the Bank on the same transaction.

(5) That it, defendant Bank, had properly accounted for the entire sum with which it was charged.

IV.

This case was heard twice in the District Court and twice in the CCA 5th. The latter tribunal handed down three opinions, 100 F. (2) 810, 101 F. (2) 974, and the not yet reported opinion of January 13, 1941. (R. 162). From the first two decisions under which the case had been remanded for further proceedings, certiorari

was applied for and denied (307 U. S. 626), possibly because the decision was not final.

The District Court, presided over by a **Texas trained** judge, at the first hearing decided in favor of the bank, saying in part:

> "That the Statute on which the surety relied, requiring monies to be drawn from the depository by checks payable to the treasurers, **was not exclusive**; that the tax collector had the right to draw out monies from the bank by checks and deposit them with the treasurer in cash; that the bank was bound to honor checks drawn by him as tax collector on the collection account." (100 F. (2) 809). (Emphasis ours).

For this and other reasons he dismissed the suit.

On appeal, the **Circuit Court of Appeals split.** Judge Hutcheson, the member of that Bench **from Texas** and, therefore, presumably the most familiar with Texas law, was in favor of affirming the judgment of the District Judge **(also a Texan)** and dismissing the suit against the Bank. He said (100 F. (2) 811) in part:

> "It is the writer's view that the Bank is not liable to the Surety; that whether the agreement under which the funds were deposited in the Collection Account had the legal effect the Bank attributes to it, the Bank in good faith and with an honest purpose thought that it had that effect, and acting under it and in good faith and with honest purpose, it was deceived and overreached by appellant's principal, the tax collector.
>
> "Certainly, the tax collector and the surety were liable to the State for the tax collector's fraud. Miller v. State, Tex. Civ. Appeals, 53 S. W. (2) 792. The writer does not see how the surety whose bond guaranteed the fidelity of the principal can recover from the bank because of his infidelity where the proof, as here, shows that the bank was

> wholly innocent of any intentional or wilful wrongdoing, and if a wrongdoer at all, was only constructively so by entering into an agreement with the tax collector which the law did not precisely allow."

He, therefore, dissented from the opinion for and judgment of reversal. The majority of the Court, however, disagreed with Judge Hutcheson and remanded the case on the theory that Article 7250 R.C.S. of Texas imposed **an exclusive** obligation on the bank to permit funds to be withdrawn from Gibson Gayle's deposit **only** by checks payable to treasurers (110 F. (2) 810), or for approved commissions, and that if the Bank permitted checks to be drawn to any other payees, it violated the law and thereby burdened itself with the obligation of knowing and being prepared to show that such checks enured to the benefit of the fisc (101 F. (2) 975). **This decision was based on a completely erroneous understanding of the Texas Statutes, as construed by the Texas courts.** The case was remanded for further proceedings in accordance with the views of the majority.

At the second hearing in the District Court, the defendant Bank **demonstrated** that Article 7250 R.C.S. of Texas, which the Circuit Court of Appeals has held prohibited a bank from honoring checks of tax collectors **other than those drawn to treasurers or drawn to tax collectors in settlement of approved commissions** became effective in June 1917, and that subsequent to that date, there had been enacted the following statutes of the State of Texas, each of which provides for the payment of tax monies by the tax collector by his checks against the depository account **for purposes other than the payment of treasurers or in settlement of approved commissions,** to-wit:

Articles of the Revised Statutes, all of which are reproduced in the margin hereof, see addenda, p. 38, *et seq.*, as follows:

> Articles 7332, 7333, 7285, 7141, 7142, 7132, 3891, 7336-F, 7335, 7335-A, 7264-A, 7264, 6675 (repealed only in 1937), 3898, and 2535.

It moreover demonstrated that the Legislature of Texas in 1923, or six years after the adoption of R.C.S. 7250, had adopted R.C.S. 2535, which deals with funds in State depositories and reads in part:

> "All remittances to the treasurer made by the state depositories, or any person or persons, **may be in cash,** by registered mail, or insured letter."

(emphasis ours), and pointed out that since the tax collector was authorized to remit to the treasurer in cash, it was plainly beyond the power of the depository to prevent the collector from withdrawing funds from the depository account **in order to secure cash.** This is emphasized by the fact that Texas R.C.S., Article 2549, expressly requires the collector to deposit all tax monies in the County depository **as soon as collected.** If the collector must deposit in the depository immediately on collection and if he **may remit cash,** obviously he is authorized to **withdraw cash** from the depository. This being so, the Texas rule, as laid down in *Q. A. & P. Ry. Co. v. Wichita Bank & Trust Co.*, 93 S. W. (2) 701, was applicable. In that case, the Texas Court said:

> "The Bank is entitled to believe that the trustee will check the trust credits out of his personal account for proper trust purposes. * * *. To require the Bank to investigate such transactions would have put a burden upon the Bank for which it is not paid by the Trustee and would clog the handling of commercial paper in a way that would

be disadvantageous of trust business and also of business in general."

On the second trial, both the District Court and the Circuit Court of Appeals apparently thought that they were bound by the law of the case erroneously to continue to hold that the tax collector was required by the Texas Statute (R.C.S. 7250) to honor checks only when drawn to treasurers or in payment of commissions on approved accounts, and to hold that if checks were drawn otherwise, the depository was charged with the duty of showing that they inured to the benefit of the fisc. **No Texas judge sat in the C.C.A.** in the second hearing. Judgment was rendered against defendant Bank and in favor of the Bonding Company for the full amount claimed, namely $52,268.98, including the $14,562.56 which, as above stated, has been proven to have inured directly to the benefit of the Bonding Company.

In rendering that judgment the Court completely ignored R.C.S. 6003 of Texas (printed *infra*, p. 28), and *Bordelon vs. Philbrick*, 84 S. W. (2) 710, and *Tabor vs. McKenzie*, 49 S. W. (2nd) 874, Brief p. 29 which decisions of appellate Texas Courts **on a question of Texas law** expressly hold that a third person may recover on an official bond although that bond is not made payable to such third person.

V.

Petitioner contends:

(1) That it did not participate in the shortage or have any knowledge or notice of same, or receive any benefit therefrom, and that all checks honored by it were signed by Gibson Gayle, as Tax Collector, or by his authorized deputy. (Both Courts concede this, R. 40, paragraph 14, 100 Fed. (2) 811, quoted *supra*). (*Vid.* Brief, p. 11).

(2) That R.C.S. 7250 effective in 1917 has been modified by R.C.S. 2535, adopted in 1923, and also by Articles 7332, 7333, 7285, 7141, 7142, 7132, 3891, 7336-F, 7335, 7335-A, 7264-A, 7264, 6675 (repealed only in 1937), and 3898, and that under those Statutes, a tax collector **may draw checks to many payees other than treasurers, and may also withdraw from the depository funds necessary to put him in possession of cash** which he is authorized to remit to the treasurer, and that Texas law, as construed by the Texas courts, (*Q. A. & P. Ry. Co. vs. Wichita Bank*, 93 S. W. (2) 701), does not place on the trustee or depository the duty of policing such checks or of proving that their proceeds inured to the benefit of the fisc; that the Circuit Court of Appeals grievously erred in imposing such obligations on petitioner, and in so deciding, **decided an important question of local law in a way in conflict with applicable local decisions.** *Vid.* Brief, p. 13. That C.C.A. was in error in so holding on the first hearing and in worse error in holding on the second hearing that that incorrect ruling was the immutable law of the case.

(3) That the record shows that Gibson Gayle withdrew $14,562.56 from his account with petitioner and used it to make good a shortage in his Highway Account, for which the Bonding Company was liable, thereby directly benefiting the Bonding Company, and that neither the Texas law nor good morals permit the Bonding Company to be again paid that $14,562.56 by collecting it from petitioner, as is contemplated by the judgment here sought to be reviewed. *Vid.* Brief, p. 25.

(4) That under R.C.S. 6003 of Texas and the decision of the Texas courts in *Bordelon vs. Philbrick*, 84 S.W. (2) 710, and *Tabor vs. McKenzie*, 49 S. W. (2) 874, it is entitled to recover from the Bonding Company for any damage caused to it by Gibson Gayle,

the tax collector whose surety the Bonding Company was, and that this right necessarily eliminates any recovery by the Bonding Company from it on the same transaction, and that this important question of local law is likewise disregarded by the decision complained of. See Brief p. 28 where 6003 is set out in full and the *Bordelon* and *Tabor* cases epitomized. 53 Fed. (2) 122 *American Surety Co. vs. Robinson.*

(5) That petitioner was entitled to permit Gibson Gayle to withdraw his statutory commissions from the depository account, and that petitioner has, as a matter of fact, shown a correct withdrawal by Gayle of the items in that account. *Vid.* Brief, p. 33.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a date certain to be therein named, a transcript of the record and proceedings herein, and that the decree herein of the said Circuit Court of Appeals, Fifth Circuit, be reversed by this Honorable Court; and your petitioner have such other and further relief in the premises as to this Court may seem meet and just.

Respectfully submitted,

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